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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 99

NATIONAL MACHINE WORKS, INC., AND INTER-STATE MACHINERY CO., INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

DONALD O. LINCOLN,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

National Machine Works, Inc., and Interstate Machinery Co., Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in these cases on March 3, 1953.

Opinions Below

The opinion of the Court of Claims (R. 32) is reported in 109 F. Supp. 402.

Jurisdiction

The judgment of the Court of Claims was entered on March 3, 1953 (R. 44; c. f. 39). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255.

Question Presented

Is a subcontractor of a bankrupt prime Government contractor entitled under the Contract Settlement Act and regulations thereunder to enforce payment of its unpaid contract termination claim directly against the United States in the Court of Claims?

Statutes and Regulations Involved

The pertinent portions of the statute and regulations involved are set out in the Appendix, *infra,* pages 21 to 30.

Statement

National Machine Works, Inc., and Interstate Machinery Co., Inc., were subcontractors of Batavia Metal Products, Inc., under the latter's prime contract, W-11-021-CWS-627, with the War Department (R. 1, 6; 11, 16). The subcontracts were terminated by Batavia following the termination of the prime contract by the United States at the end of World War II (R. 1, 6; 11, 16). National and Interstate submitted their contract termination claims to Batavia in the amounts of $96,845 and $89,467, respectively (R. 1; 11). The termination claims were then settled in amount by agreement reached through negotiation conducted between the subcontractors, Batavia, and the contracting officer (R. 1-2, 7; 11, 16-17). Batavia confirmed the settlement agreements in writing in the amounts of $66,-979.23 for National and $60,282.65 for Interstate, and they were approved by the contracting officer (R. 2, 11-12). Before any payment of these settled claims was made, Batavia became bankrupt (R. 2, 8; 12, 18). National and Interstate requested the United States to pay the amount of the settled claims directly to them, but the United States refused (R. 3, 9; 13, 18). National and Interstate filed claims in the Batavia bankruptcy proceeding in the United States Dis-

trict Court for the Northern District of Illinois (R. 4-5, 10; 14, 19). Two banks in Chicago held $227,788 in special accounts jointly established by Batavia and the Government for payments under Batavia's prime contracts (R. 22-23). Two accounts totaling $194,829 were for payments under Contract W-11-021-CWS-627 under which National and Interstate were subcontractors (R. 23). The trustees in bankruptcy claimed those funds as part of the bankrupt's estate (R. 23). The banks refused to turn the funds over to the trustees because withdrawal required the countersignature of an officer of the Government, which had been refused (R. 23). The trustee petitioned the bankruptcy court for an order directing the banks to turn over the funds (R. 23). The United States intervened, alleging the funds had been advanced by it to provide for payments under the prime contracts including approved subcontractor termination claims on condition that sums remaining after such payments be returned to the United States (R. 24). The Government listed certain subcontractor termination claims in its petition as approved for payment, excluding the claims of National and Interstate, and asked for an order directing the trustees to pay those claims and to pay the balance of the funds, $209,910, over to the Government (R. 24, 25). The court entered such an order (R. 25), but before it was compiled with, National and Interstate petitioned the court to vacate the order and determine their right to payment of their approved termination claims out of the funds held by the banks (R. 25-26). The court entered an order pendente lite restraining the bank from disbursing the funds (R. 26). National and Interstate thus petitioned for payment of their settled and approved termination claims out of the funds in the special account for payment of subcontractor claims under Contract W-11-021-CWS-627 (R. 25-26). The Government opposed on the ground that the bankruptcy court lacked jurisdiction of the

claims (R. 26). The court ruled that it had no jurisdiction of any claim against the United States exceeding $10,000, and that the Court of Claims had exclusive jurisdiction of petitioners' claims (R. 27-28). National and Interstate's petition was dismissed (R. 28).

On May 10, 1951, National and Interstate made written demands upon the contracting agency for findings pursuant to § 13(a)(2) of the Contract Settlement Act of determinations of the amounts payable on their termination claims (R. 3, 9; 13, 18-19). No findings were forthcoming and on August 13, 1951, more than ninety days after demanding the findings and less than a year of that demand, National and Interstate brought actions in the Court of Claims to enforce payment of their termination claims as subcontractors of Batavia (R. 3; 13). The United States moved for summary judgment, and on January 13, 1953, the Court sustained the motion (R. 32-38). The Court held that the United States was not responsible for the settlement of these subcontractors' termination claims under § 7(d) of the Contract Settlement Act because there had been no express assumption of responsibility by the United States (R. 36, 37). The Court also ruled that § 7(b) of the Act did not require the United States to make direct payment to the subcontractors despite the bankruptcy of Batavia (R. 36, 37). The Court acknowledged that § 7(b) made it obligatory on the contracting agency to see to it that any payment to the prime contractor on account of the termination claim of a subcontractor should get into the hands of the subcontractor (R. 35, 36). The Court refused to hold that the United States is obliged to pay the claim of a subcontractor whenever the prime contractor goes into bankruptcy, however, stating (R. 36):

> "If a dispute arises or has arisen between the prime contractor and the defendant, and if the defendant claims that the prime contractor is not due any pay-

ment at all, or not enough to satisfy the claim of the subcontractor, then there is certainly no obligation on the part of the defendant to pay the termination claim of the subcontractor."

On January 21, 1953, the Court entered an order clarifying its opinion and dismissing the actions (R. 39). On February 12, 1953, petitioners moved for a rehearing (R. 39, 40) which was denied by the Court on March 3, 1953, its final order overruling the motion being entered that day (R. 44).

Specification of Errors to Be Urged

The Court of Claims erred:

1. In holding that the United States is not obliged under § 7(b) of the Contract Settlement Act in the event of the bankruptcy of the prime contractor to pay directly unpaid termination claims of subcontractors of the bankrupt.

2. In finding on the record before it that a dispute had arisen between the prime contractor and the United States or that the United States claimed that the prime contractor was not due any payment sufficient to satisfy in whole or part these subcontractor claims.

3. In holding that the obligation of the United States to settle directly subcontractor termination claims under § 7(b) of the Contract Settlement Act is qualified by the state of accounts between the United States and the prime contractor.

4. In failing to hold that the United States is obligated to settle and pay directly the termination claims of subcontractors of a bankrupt prime contractor under the provisions of §§ 7(b) and (d) of the Contract Settlement Act, ¶¶ 2 and 3 of Regulation 17 of the Office of Contract Settlement, and Parts 5 and 6 of the Joint Termination Regulation.

5. In holding that Regulation 17 of the Office of Contract

Settlement and Parts 5 and 6 of the Joint Termination Regulation do not, in the event of the bankruptcy of the prime contractor, give the subcontractor an enforceable right of action on its termination claim against the United States in the Court of Claims under 28 U. S. C. § 1491(3).

6. In dismissing the petitioner's complaints.

Reasons for Granting the Writ

1. The question presented is of great importance in Government contract law. Government policy during defense mobilization is to broaden the industrial base. This results in redistributing prime contract obligations to successive tiers of subcontractors. During World War II, for example, the War Department required prime contractors to subcontract as much work as possible, and the Navy had a similar policy. (CCH War Law Service, Government Contracts, ¶ 1275.) The Army's present policy is one of "aggressive encouragement or requirement of subcontracting by prime contractors." Army Procurement Procedure § 1-301(6) [CCH Government Contracts Reporter ¶ 19,051]. The Department of Defense and the Air Force have similar policies. (CCH, Government Contracts Reporter ¶ 2020A; Air Force Procurement Procedure § 1-3-2(b), CCH Government Contracts Reporter ¶ 27,932.) The success of the war production effort depends on the fullest participation of the nation's small business firms in this program. In doing so, however, they become posited in a complex structure of Government contracts and subcontracts in which the ultimate beneficiary of their performance is normally shielded from liability through the technicality of lack of privity. Their own security becomes dependent upon the financial stability of firms in whose selection they have no voice and whose credit standing alone would in normal times have excluded from their consideration. Insolvency of the prime contractor or a major intermediate subcon-

tractor deprives them of payment for their performance of that part of the ultimate procurement objective allotted to them. When the Government terminates the prime contracts for convenience, subsequent insolvency of the prime contractor, often precipitated by the termination, prevents the subcontractor from securing fair compensation for the work done, materials purchased, and expenses incurred looking to performance of the terminated contract, though the Government has received the benefit of that performance.

Congress became aware of this problem and provided for its solution in several ways in the Contract Settlement Act of 1944 (58 Stat. 649, 41 U. S. C. A. §§ 101-125). In § 7(d) of the Act it gave contracting agencies discretion to assume responsibility for direct settlement of subcontractor claims as a means of effecting prompt and equitable settlement of such claims. Under the leadership of the House of Representatives, Congress went even further to protect subcontractors from the insolvency of upper tier contractors. In § 7(b) of the Act it directed contracting agencies to supervise termination claim payments so that subcontractors of insolvent prime contractors would be assured the receipt of payments to the prime contractor for their benefit. Section 7(b) was regarded as an additional way over § 7(d) of protecting the subcontractor when the prime contractor became insolvent, because it then placed a mandatory duty on the contracting agency to pay the termination claim of the subcontractor. House Report 1590, 78th Cong., 2d Sess., p. 33; statements of Congressmen Kefauver, Gwynne, and Walter, representing the House Committee on the Judiciary, explaining the purpose of the bill in debates in the House; 90 Cong. Record, p. 6059, 6082, June 16, 1944; p. 6131, June 17, 1944.

The decision of the Court of Claims thwarts this Congressional purpose and prevents petitioners from recover-

ing the total of $127,261 due them on their settled and approved termination claims though the United States has received the benefit of their performance, and their prime contractor is insolvent. The Court's decision errs in making the mandatory duty imposed by § 7(b) of the Act dependent upon the express assumption of responsibility contemplated by § 7(d). Those subsections of § 7 are independent of each other. The structure of § 7 and the legislative history unite in affirming this fact.

The Court below acknowledged that § 7(b) and its legislative history makes it "obligatory on the contracting agency to see to it that any payment to the war contractor on account of the termination claim of a subcontractor should get into the hands of the subcontractor." The official papers of the bankruptcy proceeding evidence that the funds on deposit in the two Chicago banks in the restricted bank account were in the nature of payments to the war contractor for the account of termination claims of its subcontractors. Those papers show that the Government recognized its duty to pay subcontractor claims in view of the prime contractor's insolvency, for the Government's petition there was to the effect that the list of subcontractor claims, except National and Interstate's claims, be paid out of the funds in the restricted bank accounts and only the balance of such funds then paid over to the Government. The refusal to pay National and Interstate out of those funds is a violation of the statutory duty placed upon the Government by § 7(b) of the statute. The court below realized that the statute's purposes would be defeated unless payment in such circumstances was made directly to the subcontractor.

The court, nevertheless, ruled against petitioners on the ground that a dispute having arisen between the prime contractor, Batavia, and the United States in which the United States claimed that Batavia was not due any payment at all

or not enough to satisfy the petitioners' claims, there was no obligation on the United States to pay the subcontractors' claims. The effect of that ruling is to qualify judicially the unqualified right given subcontractors to payment by § 7(b) of the statute in circumstances where the prime contractor is insolvent. Nothing contained in the statute itself or the legislative history supports the court's decision creating that qualification. Indeed, the regulations promulgated by the Director of the Office of Contract Settlement under the authority conferred upon him by the Act specifically state that the contracting agency's duty to settle directly the termination claims of subcontractors in the event of the insolvency of the prime contractor shall not be affected by the state of accounts between the Government and the prime contractor. (¶ 3(e), Reg. 17, OCS, CCH War Law Service, Government Contracts ¶ 8502.) The regulations of the contracting agency are similarly explicit on the point. (¶ 663.5, Joint Termination Regulation, CCH War Law Service, Government Contracts ¶ 10,663.5.)

The decision of the Court of Claims, therefore, erroneously limits the absolute right conferred upon subcontractors by the Contract Settlement Act in bankruptcy situations and sets at nought the effort of the Congress to provide a specific remedy for a large class of business enterprises which without that remedy will be unjustly deprived of payment for performance, the benefit of which has been received under Government contracts by the United States.

2. The decision of the Court of Claims conflicts with this Court's decision in *United States* v. *Griffin*, 303 U.S. 226, 238. In *Griffin*, this Court held that a carrier who had secured a finding of the amount due it as fair compensation for the carriage of mail under the Railway Mail Pay Act could bring an action for payment of that amount in the Court of Claims though the Interstate Commerce Commis-

sion had failed because of an alleged error of law to order payment of the amount which the carrier believed due under the finding. The Court of Claims has jurisdiction of an action for the amount because the carrier's claim would be one founded upon a law of Congress. In these cases, petitioners have secured a determination as provided in the Contract Setttlement Act, through negotiation and agreement with the prime contractor and the contracting officer, of the amount due as fair compensation on their terminated subcontracts. The Government agency charged with the duty under § 7(b) of the Act has through an error of law failed to order payment of petitioners' claims. Under these circumstances the Court of Claims has jurisdiction of petitioners' claims as founded on a law of Congress. The Court below erred in holding that a sub-contractor could never maintain an action against the Government until an obligation of the Government to the prime contractor is established; and it erred in refusing to hold that § 7(b) of the Contract Settlement Act conferred upon these petitioners a claim enforceable in the Court of Claims as founded on a law of Congress. *United States* v. *Griffin, supra;* 28 U.S.C. § 1491(2).

3. The Court below departed from the accepted course of judicial proceedings and based its decision on matters regarded by the Court as facts which were not contained in the record before it. The Court of Claims refused to grant payment of petitioners' claims because it assumed that the Government disputed or denied any obligation to the prime contractor. The record before the Court consisted only of the complaint, answer, and petitioners' affidavits and the papers in the bankruptcy court. None of these contain any foundation for the assumption of the Court below that a dispute existed between Batavia and the United States under which Batavia was not due funds in whole or part sufficient

to satisfy the claims of National and Interstate. The bankruptcy court papers affirmatively indicate, on the contrary, that the Government recognized under all the circumstances an obligation to pay Batavia's subcontractors the amounts of their approved termination claims. The decision of the Court below is tantamount to a holding that the subcontractor claims were a part of the bankrupt's estate and hence could be offset against a presumed overall obligation of the bankrupt to the Government. The bankruptcy court refused to treat the subcontractor claims as part of the debtor's estate, and its decision is in accord with that of the Court of Appeals for the Eighth Circuit in *Daniel Hamm Drayage Co.* v. *Wilson*, 178 F. 2d 633. But even if the Court of Claims were not in error on this point as a matter of law, the action of the United States in scheduling the other subcontractor claims for payment out of the special Batavia bank accounts certainly belies any adverse state of accounts between Batavia and the Government under the theory of the Court below. The Court of Claims' treatment of petitioners' claims thus rests (1) upon a legal conclusion as to the nature of those claims which conflicts with the Eighth Circuit's decision in *Daniel Hamm, supra,* and (2) upon an assumed state of facts not contained in the record which indeed the record affirmatively shows is erroneous. This Court should grant certiorari to correct the departure of the Court below from the proper course of judicial proceedings, and to resolve the conflict with the Eighth Circuit.

4. The decision of the Court of Claims is directly contrary to the settled interpretation of the statute by the Office of Contract Settlement, the agency charged by Congress with supervision over the administration of the statute.

Section 4(a) of the Contract Settlement Act created the Office of Contract Settlement headed by a Director. The

Director was empowered by § 4(b) of the Act to issue regulations establishing procedures to be followed by contracting agencies. In Regulation 17 (10 F. R. 6250, CCH War Law Service, Government Contracts ¶ 8502) the Director, exercising his regulatory authority, established procedures to be followed by the contracting agencies under § 7 of the Act. Regulation 17 directed the contracting agency, in the event of the bankruptcy of a prime contractor, to control payments to the prime contractor in one of several specified ways, including the use of restricted joint bank accounts, to insure receipt of payment by subcontractors; and where such measures were not available or were inappropriate, the contracting agency was directed by the Regulation to settle directly the termination claims of affected subcontractors. The latter included a determination of the amount due the subcontractor and the payment of that amount; or payment of an amount which had previously been determined under any appropriate procedure to be due the subcontractor. Under the circumstances present in these actions, the contracting agency was under a mandatory duty to control payments to National and Interstate through the special bank accounts established for the payment of subcontractor termination claims under Contract W-11-021-CWS-627. Failing that, the contracting agency was explicitly required by Regulation 17 to pay petitioners directly the amounts which had been determined through negotiation and embodiment in approved settlement agreements to be due them as subcontractors of Batavia.

Regulation 17 of the Office of Contract Settlement admits of no other interpretation. The obligation it imposed upon the contracting agency was delineated with emphasis in *Ohio Casket Hardware Co., Inc., d/b/a Allen Tool & Mfg. Co.* v. *War Department*, 1 App. Bd. OCS No. 21. There, the Appeals Board of the Office of Contract Settlement

under circumstances identical in all material respects with those present in these actions, held that § 7(b) and Regulation 17, *supra,* required the contracting agency to pay the subcontractor or undertake direct settlement. In that case a prime contractor had become bankrupt before a subcontractor's claim was paid. The Government filed a claim in the bankruptcy proceeding. The subcontractor requested the Government to make direct payment to it of the amount due on its claim, and the Government refused. The subcontractor appealed under the Act to the Board. The Government moved to dismiss on the ground that under § 7(d) of the Act it was not obliged to settle directly with the subcontractor because it had not expressly assumed responsibility for direct settlement within the meaning of that section. The Board held that the precedents under § 7(d) (which were likewise relied upon by the court below) were inapplicable in view of § 7(b), Regulation 17, and the conceded bankruptcy of the prime contractor. The Board held that the contracting agency was required to pay the subcontractor on its termination claim and proceeded to award the amount determined to be due on the claim to the subcontractor.

Regulation 17 is within the regulatory authority conferred by Congress on the agency it charged with directing the administration of the Act. It's terms are certain, and the obligation for direct settlement and payment of subcontractor claims in bankruptcy situations it imposes on contracting agencies accords with the objective of § 7(b) of the Act. The *Ohio Casket* ruling of the agency's appellate tribunal is a well-reasoned and authoritative application of Regulation 17 to circumstances identical with those at bar. The refusal of the Court of Claims to give Regulation 17 the effect required by its terms, and its refusal to accept and follow the interpretation of the Appeals Board, O.C.S., in

the *Ohio Casket* case are erroneous. The question presented is of unique importance to subcontractors. The decision below deprives this entire class of business enterprises of rights deliberately conferred upon them by Congress and emphatically reserved to them by the regulations and administrative practice of the Office of Contract Settlement. This Court should review a decision of the Court of Claims which upsets this administrative practice and sets at nought such an important federal right.

5. The decision of the Court below conflicts with the decision of the Court of Appeals for the Eighth Circuit in *Daniel Hamm Drayage Co.* v. *Wilson, supra.* There, in the bankruptcy proceeding of a prime contractor, the Government settled the termination claim of the prime contractor exclusive of the terminated claims of subcontractors and agreed as part of the settlement of that claim to settle directly the termination claims of the subcontractors. The general creditors of the prime contractor objected to the payment of the subcontractors and wished to have the funds which would be used for that purpose regarded as general assets of the bankrupt. The Court of Appeals affirmed the ruling of the bankruptcy court that the proposed settlement and direct payment of subcontractors ahead of the general creditors was proper. It expressly approved the arrangement under which the Government settled directly the claims of subcontractors, thereby preventing the amounts of those payments from becoming a part of the debtor's estate, on the ground that the Contract Settlement Act "provides for direct settlement of termination claims of subcontractors where the prime contractor is insolvent" (178 F. 2d at 637). The court rejected the contention of the general creditors that the moneys payable on account of the termination claims of the subcontractors constituted property or assets of the debtor;

consequently, the right of the subcontractors to payment was not affected by the state of accounts between the Government and the bankrupt and "the subcontractors had the independent right to collect and receive from the Government the amounts due them on termination of their contracts" (178 F. 2d at 638). Basic to the decision of the Court of Claims that recovery would not be accorded petitioners here because of an assumed adverse state of accounts between the prime contractor and the Government is the premise that moneys payable on account of the termination claims of National and Interstate constitute property or assets of Batavia. Such a ruling conflicts with the conclusion reached by the Eighth Circuit in *Daniel Hamm, supra.* Furthermore, that court expressly held that the Contract Settlement Act provides for direct settlement of subcontractor claims where the prime contractor is bankrupt. This is the reading the Court of Claims refused to give § 7 (b) of the Act. Most termination cases of necessity must be brought in the Court of Claims because of their amount. The Court of Claims does not often err, but where it does the class of persons affected is quite large because of its unique jurisdiction. The conflicts in its decision with the Court of Appeals for the Eighth Circuit go to the essence of subcontractor rights under the Contract Settlement Act. Petitioners submit the Court below erred on these points, and the conflict should be settled by this Court.

6. The Court of Claims erred in refusing to hold that the Regulations of the Director of the Office of Contract Settlement and the Joint Termination Regulations give the petitioners a right of action against the United States in that Court. The authority given the Director of the Office of Contract Settlement, described above, by the Contract Settlement Act included the power "to govern the exercise

of the authority and discretion and the performance of the duties" of contracting agencies. By § 4(b)(2) of the Act the Director was authorized to "require or restrict the exercise of any such authority and discretion, or the performance of any such duty or function" to the extent that he deemed necessary. The Director's Regulation 17 expressly invokes the authority granted him under § 4(b) of the Act. Petitioners concede that § 7(d) of the Act confers discretion upon the contracting agencies to accept responsibility for the direct settlement of subcontractor claims. The exercise of that discretion, however, may be compelled by the Director under his § 4(b) authority. In ¶ 3(a) of Regulation 17 the Director makes it clear that he is exercising that power. That paragraph bears the caption, "Direct settlement and payment of subcontractors' claims under Section 7(d) of the Act." Subparagraph (a) of ¶ 3 states that "The procedures set forth in this paragraph are deemed to be necessary and desirable for the expeditious and equitable settlement of the termination claims of subcontractors." The Director then specifies in ¶ 3(c) of the Regulation that whenever the prime contractor is bankrupt, the contracting agency is required to insure payments to subcontractors or to "settle directly the termination claims of such subcontractors."

Section 4(c) of the Act requires contracting agencies to issue such regulations concerning their own operations and procedures as are necessary to carry out the policies and procedures prescribed by the Director. The contracting agencies did so by publishing the Joint Termination Regulation. The policies and procedures prescribed by the Director in Regulation 17 are carried out by the contracting agencies in Parts 5 and 6, Section VI of that Regulation. There, in substantially the language of Regulation 17, the Joint Termination Regulation provides that in the

event of the bankruptcy of the prime contractor, the contracting agency shall settle directly the termination claims of the affected subcontractors.

It is evident that the contracting agency in these cases did not control payments to Batavia so as to insure their receipt by National and Interstate. Though according that treatment to other subcontractors, the Government refused, as indicated above, to permit payments to be received by these subcontractors. Consequently, ¶ 3 of Regulation 17, and Parts 5 and 6, Section VI of the Joint Termination Regulation require the contracting agency to settle directly the termination claims of National and Interstate.

Since Regulation 17 of the Office of Contract Settlement and Parts 5 and 6, Section VI of the Joint Termination Regulation are obviously within the scope of the authority conferred upon the Director and the contracting agencies by § 4 of the Contract Settlement Act, the requirements of those regulations have "the same force as though prescribed in terms by the statute." *Atchison T. & S. F. Ry. Co.* v. *Scarlett,* 300 U. S. 471, 474. The Court of Claims specifically has jurisdiction over a right to payment founded upon a regulation, 28 U.S.C. § 1491(3). Its refusal to exercise that jurisdiction in the favor of these petitioners calls for an exercise of the Supreme Court's supervisory power, particularly since the Court's decision implies that a right of action could not be based upon a regulation.

The Court below held that the extent of the Government's obligation was to see that any payment made to the prime contractor for the benefit of the subcontractor got into the hands of the subcontractor. The Court thus excluded the obligation imposed by Regulation 17 and the Joint Termination Regulation upon the contracting agency to settle directly with the subcontractor where payments to the prime for the benefit of the subcontractor did not occur. The

Court stated that it did not think the Regulations "change this situation in any respect, even if they could." (R. 37) This ruling is in derogation of its jurisdiction and conflicts with the Court's own decisions under 28 U.S.C. § 1491(3). In *Daniel Simon* v. *United States,* 113 C. Cls. 182, the plaintiff had been discharged contrary to the rights conferred upon him by the Civil Service Regulations. He sued in the Court of Claims for the salary of which he had been deprived, basing his suit upon the denial of a right accorded to him by the regulations. The Government argued that the regulations did not create rights enforceable in the Court of Claims through a money judgment. *In limine,* therefore, the Court was confronted with the question as to whether the regulations involved had the force and effect of law. The Court concluded that they did and held that it was not necessary to its jurisdiction to render a money judgment based upon the rights conferred by a regulation, that the statute or regulation upon which the claim is founded contain a provision that denial of the legal right conferred by the regulation shall give rise to a cause of action for compensation or damages. This matter was held by the Court to be cared for by the broad jurisdiction conferred by 28 U.S.C. § 1491.

In these actions the lawful regulations of the Director of the Office of Contract Settlement gave National and Interstate the right to receive payment on their termination claims or to have those claims settled directly by the contracting agency. The denial of that right by the contracting agency entitles petitioners to invoke the jurisdiction of the Court of Claims under 28 U.S.C. § 1491(3) and to receive a money judgment therein for the amount of the termination claim either as embodied in the settlement agreement or as determined by the Court. The decision of the Court of Claims that the Regulations could not con-

fer a right upon the petitioners to enforce payment in an action against the Government is in conflict with the *Simon* case, *supra,* as well as the decision of this Court upon which *Simon* was based, *United States* v. *Wickersham,* 201 U. S. 390.

Moreover, the Contract Settlement Act itself at § 13 provides for specific jurisdiction by the Court of Claims in these cases. As we have seen, Regulation 17 and the Joint Termination Regulation place upon the contracting agency mandatory duty to settle directly the termination claims of an insolvent prime contractor's subcontractors. Section 13 of the Act provides that whenever a contracting agency "responsible for settling any termination claim" has not done so, the contractor may demand findings; and upon failure of the agency to deliver findings, the contractor may bring suit in the Court of Claims or appeal to the Appeals Board of the Office of Contract Settlement. The bankruptcy of Batavia, the refusal of the United States to supervise payments so that these subcontractors were paid (though it did so for Batavia's other subcontractors), Regulation 17, and the Joint Termination Regulation have the effect of making the contracting agency "responsible for settling" the termination claims of National and Interstate. Findings were demanded by National and Interstate but were not forthcoming. Consequently, under the terms of § 13 of the Act, these petitioners were properly in the Court of Claims seeking a money judgment. Dismissal of their actions by the Court on the ground that the Regulations did not and could not permit them to be there is erroneous. The decision is of far-reaching importance because of its refusal to recognize that a right of action enforceable in the Court of Claims can be based upon a regulation. To protect the important right conferred upon litigants by the withdrawal of sovereign im-

munity from suit contained in 28 U.S.C. § 1491(3), this Court should review the decision of the Court below.

Conclusion

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD O. LINCOLN,
Counsel for Petitioners.

APPENDIX

Statutes and Regulations pertinent to this petition:

Contract Settlement Act of 1944 (58 Stat. 649, 41 U.S.C.A. §§ 101-125), as follows:

> § 4(a) There is hereby established the Office of Contract Settlement which shall be headed by the Director of Contract Settlement. * * *
>
> (b) In order to insure uniform and efficient administration of the provisions of this Act, the Director, subject to such provisions, by general orders or general regulations—
>
> (1) shall prescribe policies, principles, methods, procedures, and standards to govern the exercise of the authority and discretion and the performance of the duties and functions of all Government agencies under this Act; and
>
> (2) may require or restrict the exercise of any such authority and discretion, or the performance of any such duty or function, to such extent as he deems necessary to carry out the provisions of this Act.
>
> (c) The exercise of any authority or discretion and the performance of any duty or function, conferred or imposed on any Government agency by this Act, shall be subject to such orders and regulations prescribed by the Director pursuant to subsection (b) of this section. Each Government agency shall carry out such orders and regulations of the Director expeditiously, and shall issue such regulations with respect to its operations and procedures as may be necessary to carry out the policies, principles, methods, procedures, and standards prescribed by the Director. Any Government agency may issue such further regulations not inconsistent with the general orders or regulations of the Director as it deems necessary or desirable to carry out the provisions of this Act.

§ 7(b) Whenever any contracting agency is satisfied of the inability of a war contractor to meet his obligations it shall exercise supervision or control over payments to the war contractor on account of termination claims of subcontractors of such war contractor to such extent and in such manner as it deems necessary or desirable for the purpose of assuring the receipt of the benefit of such payments by the subcontractors.

§ 7 (d) Any contracting agency may settle directly termination claims of subcontractors to the extent that it deems such action necessary or desirable for the expeditious and equitable settlement of such claims. In making such termination settlements any contracting agency may discharge the claim of the subcontractor by payment or may purchase such claim, and may agree to assume, or indemnify the subcontractor against, any claims by any person in connection with such claim or the termination settlement. Any contracting agency undertaking to settle the termination claim of any subcontractor shall deliver to the subcontractor and the war contractor liable to him written notice stating its acceptance of responsibility for settling his claim and the conditions applicable thereto, which may include the release, or assignment to the contracting agency, of his claim against the war contractor liable to him; upon consent thereto by the subcontractor, the Government shall become liable for the settlement of his claims upon the conditions specified in the notice.

§ 13 (a) Whenever the contracting agency responsible for settling any termination claim has not settled the claim by agreement or has so settled only a part of the claim, (1) the contracting agency at any time may determine the amount due on such claim or such unsettled part, and prepare written findings indicating the basis of the determination, and deliver a copy of such findings to the war contractor, or (2) if the termination claim has been submitted in the manner and substantially the form prescribed under this Act, the contracting agency, upon written demand by the

war contractor for such findings, shall determine the amount due on the claim or unsettled part and prepare and deliver such findings to the war contractor within ninety days after the receipt by the agency of such demand. * * *

(b) Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election—

(1) appeal to the Appeal Board in accordance with subsection (d) of this section; or

(2) bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of section 24 of the Judicial Code (28 U. S. C. 41 (20)), * * *.

§ 13(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions: * * *

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, or (ii) in case of protests or appeal within the agency, within ninety days after the determination of such protest or appeal, or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with subsection (b) of this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim.

Regulation No. 17 of Office of Contract Settlement, issued May 29, 1945 (10 F. R. 6250; CCH War Law Service, Gov-

ernment Contracts, ¶ 8502), "Protection of Termination Claims of Subcontractors."

Pursuant to Sections 4(b) and 7 of the Contract Settlement Act of 1944, the following policies, principles, methods, procedures and standards are prescribed for the protection of certain termination claims of subcontractors.

1. *Scope of regulation.*—This regulation prescribes methods of assuring to subcontractors certain payments which, by reason of the insolvency or possible insolvency of higher tier war contractors, or other cause, they might not receive under the usual vertical basis of settlement of termination claims through the prime contractor and intervening subcontractors. As used in this regulation, the term "termination claim" of a subcontractor includes only the claim or demand for fair compensation for the termination of his subcontract, in accordance with the standards prescribed under Section 6 of the Act and Regulations of this Office. This regulation does not apply to claims on account of completed articles delivered or services performed pursuant to subcontracts or to other claims under terminated subcontracts. Paragraphs 2 and 3 of this regulation apply only to termination claims under subcontracts terminated as a result of the modification or termination of a prime contract for the convenience or at the option of the Government, or under other circumstances which require the Government to bear the cost of settling the terminated subcontract.

2. *Protection of payments on account of subcontractors' claims under Section 7(b) of the Act.*—Whenever any contracting agency is satisfied of the inability of a war contractor to meet his obligations, the contracting agency shall exercise supervision or control over payments to that war contractor on account of termination claims of his subcontractors to such extent and in such manner as it deems necessary or desirable for the purpose of assuring the receipt of the benefit of such payments by the subcontractors. Methods of supervision or control which may be employed include payment

through a trustee or escrow agent, and the deposit of funds in a special account from which withdrawal is subject to approval or countersignature by a Government representative.

3. *Direct settlement and payment of subcontractors' claims under Section 7(d) of the Act.*—

(a) The procedures set forth in this paragraph are deemed to be necessary and desirable for the expeditious and equitable settlement of the termination claims of subcontractors.

(b) As used in this regulation the words "settle directly" or "direct settlement" refer to (1) the negotiation or determination by a contracting agency of the amount due on account of the termination claim of a subcontractor and the payment of such amount to the subcontractor, or (2) the payment to a subcontractor of the amount which has been determined to be due on his termination claim by a settlement which was made under any other authorized procedure and adopted and assumed by the contracting agency. In making direct settlement, the contracting agency shall comply with the procedures set forth in Section 7(d) of the Act.

(c) Whenever any contracting agency is satisfied that a war contractor is, or is in serious danger of becoming, unable to meet his obligations, and where it considers that action under paragraph 2 of this regulation would fail to assure prompt payment of the termination claims of his subcontractors, the contracting agency shall, subject to paragraph 6 hereof, settle directly the termination claims of such subcontractors.

(d) Any contracting agency may also so settle directly the termination claims of subcontractors in other cases where it deems such action necessary or desirable for the expeditious and equitable settlement of such claims.

(e) Direct settlement with a subcontractor may be made without regard to any assignment by, or insolvency or bankruptcy of, higher tier war contrac-

tors, and without regard to set-offs between contractors in the contractual chain. Such direct settlement shall be made without deduction for claims which the Government may have against the prime contractor or any other higher tier war contractor. Nothing herein shall prevent a contracting agency from protecting set-offs which the Government may have against the subcontractor with whom direct settlement is made.

(f) Direct settlement with a subcontractor may be made without regard to any limitation on the amount payable by the Government to a prime contractor.

* * * * * * *

4. *Duty to investigate.*—A contracting agency shall be under no duty to make an investigation of the financial condition of any war contractor until it has received a request for protection from one or more subcontractors. If such a request is received, the contracting agency shall take such steps as it considers reasonable to investigate the financial condition of the contractor concerned. The identity of the contractor making the request shall not be disclosed except to Government personnel concerned with such investigation. Among the cases in which a war contractor shall be deemed to be unable to meet its obligations are those where it is insolvent or bankrupt or involved in pending proceedings in insolvency, bankruptcy, receivership or corporate reorganization.

Section VI, Parts 5 and 6, Joint Termination Regulation of the War and Navy Departments (10 F. R. 7985; CCH War Law Service, Government Contracts, ¶¶ 10,650, 10,660:

PART 5—PROTECTION OF SUBCONTRACTORS

650 *Scope.*—This Part deals with special proceedures for protecting subcontractors where the prime contractor is unable to meet his obligations. The requirements of Regulation No. 17 of the Office of Contract

Settlement entitled "Protection of Termination Claims of Subcontractors" (see Appendix B) are effectuated in this Part and the succeeding Part 6 of this Section.

651 *Supervision of payments to prime contractor for subcontractors.*—

651.1 *Statutory provisions.*—Section 7(b) of the Act provides:

> "(b) Whenever any contracting agency is satisfied of the inability of a war contractor to meet his obligations, it shall exercise supervision or control over payments to the war contractor on account of termination claims of subcontractors of such war contractor to such extent and in such manner as it deems necessary or desirable for the purpose of assuring the receipt of the benefit of such payments by the subcontractors."

651.2 *When duty to supervise arises.*—(1) The contracting officer shall be under no duty to make an investigation of the financial condition of any war contractor until he has received a request for protection from one or more subcontractors. If such request is made to him, the contracting officer shall take such steps as he considers reasonable to investigate the financial condition of the war contractor concerned. The identity of the contractor making the request shall not be disclosed except to Government personnel concerned with such investigation.

(2) In determining whether a war contractor is unable to meet his obligations, the contracting officer is required to act only on the basis of substantial evidence indicating that the contractor is insolvent or bankrupt or is involved in pending proceedings in insolvency, bankruptcy, receivership or corporate reorganization, or is in imminent danger of such proceedings.

651.3 *Methods of supervision.*—Whenever the contracting officer is satisfied that a prime contractor, or a subcontractor with whom a direct settlement is made, is unable to meet his obligations, he shall

(1) Follow substantially the procedure outlined in paragraph 367 in making payments to the war contractor on account of termination claims of subcontractors, or

(2) Make such payments through a trustee or escrow agent, or

(3) Settle directly the termination claims of subcontractors in accordance with Part 6 of this Section VI.

In his discretion, the contracting officer may take action under this paragraph in other cases where he deems it necessary or desirable for the protection of subcontractors.

PART 6—DIRECT SETTLEMENT OF SUBCONTRACTS BY GOVERNMENT

660 *Scope.*—This Part deals with the direct settlement and payment by the Government of termination claims of subcontractors in individual cases. It does not apply to direct settlement on a company-wide basis pursuant to Part 5 of Section VIII. The requirements of Regulation No. 17 of the Office of Contract Settlement entitled "Protection of Termination Claims of Subcontractors" (see Appendix B) are effectuated in this Part and the preceding Part 5 of this Section.

• • • • • • •

662 *Authority to settle subcontract claims directly where no contract provisions therefor.*—

662.1 *Statutory provisions.*—Section 7(d) of the Act authorizes the War and Navy Departments to settle directly termination claims of subcontractors to the extent that such action is deemed necessary or desirable for the expeditious and equitable settlement of such claims, and prescribes certain procedures to be followed for this purpose.

662.2 *Methods of direct settlement.*—As used in this Section IV, unless the context clearly indicates otherwise, the terms "settle directly" or "direct settlement" refer to

(1) the negotiation or determination by a contracting agency of the amount due on account of the termination claim of a subcontractor and the payment of such amount to the subcontractor, or

(2) the payment to a subcontractor of the amount which has been determined to be due on his termination claim by a settlement which was made under any other authorized procedure and adopted and assumed by the contracting agency.

662.3 *When required.*—Whenever the contracting officer is satisfied that a war contractor is, or is in serious danger of becoming, unable to meet his obligations, and where he considers that action under subparagraph (1) or (2) of paragraph 651.3 would fail to assure prompt payment of the termination claims of subcontractors of that war contractor, the contracting officer shall settle directly, subject to the provisions of paragraph 662.5, the termination claims of such subcontractors. The duties of the contracting officer with respect to investigation of the financial condition of a war contractor, and the determination that a war contractor is, or is in serious danger of becoming, unable to meet his obligations shall be determined in accordance with paragraph 651.2.

662.4 *When authorized.*—(1) The contracting officer may settle directly the termination claim of any subcontractor in any other case in which such action is deemed necessary or desirable for the expeditious and equitable settlement of such claim.

• • • • • • •

662.5 *Limitation of authority.*—The authority under this paragraph 662 shall not be used to settle any claim other than the claim or demand for fair compensation for the termination of the subcontract.

• • • • • • •

663.5. *Set-offs, assignments and insolvency.*—(1) The contracting officer may settle directly with a sub-

contractor under paragraph 662 without regard to any assignment by, or insolvency or bankruptcy of, higher tier war contractors, and without regard to set-offs between contractors in the contractual chain. Such direct settlement shall be made without deduction for claims which the Government may have against the prime contractor or any other higher tier war contractor.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 99

NATIONAL MACHINE WORKS, INC., AND INTERSTATE MACHINERY CO., INC., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims granting the Government's motion for summary judgment (R. 32-38) is reported at 109 F. Supp. 402.

JURISDICTION

The order of the Court of Claims overruling petitioners' timely motion for a rehearing was entered on March 3, 1953. The petition for a writ of certiorari was filed on May 29, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether it is mandatory for a Government contracting agency, in the exercise of discretionary authority conferred by the Contract Settlement Act, to assume direct liability to a subcontractor for settlement of its termination claim where that contracting agency disputes the amount due upon the prime contract and has formally referred to the Department of Justice for investigation and appropriate action under the Act a possible war frauds violation by the bankrupt prime contractor with which the subcontractor was affiliated and allied.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the Contract Settlement Act, 58 Stat. 649, 41 U.S.C. 101-125, and the regulations issued thereunder are set forth in the Appendix, pp. 17-22, *infra*.

STATEMENT

Petitioners were subcontractors of Batavia Metal Products, Inc., under a prime contract held by that company with the War Department (R. 1, 6, 11, 16). At the end of World War II, the Government terminated the prime contract and Batavia subsequently terminated its subcontracts with petitioners (R. 1, 6, 11, 16). Petitioners submitted their contract termination claims to Batavia and, following conferences and negotiations, reached agreements with Batavia settling the claims in the amount of $66,979.23 for National Machine Works, Inc., and $60,282.65 for Interstate Machinery Co., Inc. (R. 1-2, 6-7, 11-12, 16-17). Ac-

cording to the allegations of the petitions below, representatives of the Government's contracting officer participated in the negotiations, and on June 5, 1946, Batavia informed petitioners that the contracting officer had approved the settlements (R. 1-2, 11-12).

Subsequent to negotiation of the settlement agreements, but before any payments had been made to petitioner, Batavia became bankrupt (R. 2, 8, 12, 18). Petitioners filed claims in the bankruptcy proceedings of Batavia and also filed petitions requesting the bankruptcy court to determine their rights to funds which had been deposited by the United States in a joint account with Batavia for the payment of the termination claims of certain subcontractors under Batavia's prime contracts (R. 4-5, 10, 14, 19). The bankruptcy court held, however, that it was without jurisdiction of the petitions to determine rights to the funds on deposit because the petitions in effect sought recoveries from the United States in excess of $10,000 (R. 22-28). Petitioners have not as yet received payment of their termination claims against Batavia (R. 2, 8, 12, 18).

On May 10, 1951, and purportedly under Section 13(a)(2) of the Contract Settlement Act, petitioners made demands upon the War Department for written findings of fact and determinations of the amount due them on their termination claims against Batavia, but no such findings were made or delivered to them (R. 4, 9, 13, 18-19). Thereafter, on August 13, 1951, petitioners instituted suits in

the court below. In addition to the facts set out above, National Machine Works, Inc., alleged as a second cause of action a termination claim as a subcontractor of Erie Basin Metal Products, Inc., in circumstances substantially the same as those regarding Batavia, except that it was not alleged that Erie had become a bankrupt.

The United States filed its answers to the petitions in the court below and also special answers denying the jurisdiction of the Court of Claims. The jurisdictional defense was based upon the ground that the Contract Settlement Act deprived that court of jurisdiction pending investigation and appropriate disposition by the Department of Justice of cases referred to it by contracting agencies in the belief that fraudulent claims had been presented.[1] The special answers further alleged that Batavia Metal Products, Inc., and Erie Basin Metal Products, Inc., had been organized in 1942, and were owned, managed, and controlled by interests identified as the Garsson-Gellman-Weiss interests; that petitioners were owned and controlled by members of the Gellman and Weiss families as a part of a group of affiliated and interlocking corporations. The special answers alleged that on May 28, 1946, a report upon the activities of the various prime contractors comprising the

[1] The special answers of the Government have been omitted from the printed record, but they have been included in the certified record filed in this Court, and, by stipulation of counsel, may be referred to in their briefs. The special answers, whose contents are summarized above, appear at pp. 24-33, 50-59 of the certified record.

Garsson-Gellman-Weiss interests, as well as their affiliated and interlocking companies, was made to the Inspector General of the Army with particular attention to the questionable or possible fraudulent practices in which the prime contractors and their affiliated subcontractors had engaged, and that on May 31, 1946, the Under Secretary of War formally referred the matter to the Department of Justice for investigation and action in accordance with the provisions of the Contract Settlement Act. According to the allegations of the special answers, the Under Secretary of War issued a suspension order on the same date directing that no payments be made to Batavia, Erie, or any of their affiliated companies, without his prior authorization and approval, and that, in accordance with this order, all tentative approvals of their termination claims were withdrawn and revoked and all payments suspended. The special answer also specifically alleged that subsequent investigation indicated that Batavia had procured over-advancements from the Government on its contracts in the sum of approximately $1,400,000 by fraudulently misstating numerous items of its costs.

Petitioners filed motions to strike the special answers filed by the Government, and the Government filed motions for summary judgment. In an opinion reported at 107 F. Supp. 588, the Court of Claims sustained petitioners' motions to strike, holding that the provisions of the Contract Settlement Act did not deprive it of jurisdiction pending termination of the administrative fraud investiga-

tions but that the Government might assert by way of counterclaim against petitioners the fraud remedies provided by that Act. Thereafter, on January 13, 1953, the court granted the Government's motion for summary judgment, holding that the United States was not liable for petitioners' termination claims because there had been no assumption of direct liability under Section 7(d) of the Contract Settlement Act and that neither the statute nor the regulations issued thereunder made it mandatory for the United States to assume such liability where a dispute had arisen between the Government and the prime contractor as to the amount due on the terminated contract.

ARGUMENT

I. Petitioners seek to bring before this Court for review a decision, clearly correct, which involves a specialized problem arising under an act establishing procedures and policies for the termination of World War II contracts. See the Declaration of Policy in Section 1 of the Contract Settlement Act of 1944, 58 Stat. 649, 41 U.S.C. 101. The Office of Contract Settlement, originally established by Section 4(a) of the Act, 58 Stat. 651, to provide for the administration of that Act has been abolished; its functions were transferred to the Secretary of the Treasury by Executive Order No. 9809, December 12, 1946, 11 F.R. 14281, and by Reorganization Plan No. 1, 1947, 61 Stat. 951; and those functions were subsequently retransferred to the Administrator of General Services by the Act of June 30, 1949,

63 Stat. 380. Very few cases arising under the Act remain unsettled, and we are not aware of any others which raise the precise problem presented in this case.[2]

2. With regard to their termination claims against Batavia, on which they seek review here, petitioners apparently do not question the proposition stated by the court below (R. 33) that, unless the Contract Settlement Act and the regulations give them a basis for recovery, they are unable to maintain these suits for lack of privity of contract with the Government.[3] See the specification of errors, Pet. 5-6. Nor do petitioners contend that basis for these suits may be found in the discretionary authority to assume direct liability for settlement of subcontractors' termination claims conferred upon contracting agencies by Section 7(d) of the Act (*infra*, pp. 17-18), except in so far as that discretion is controlled by the regulations issued by the Director of Contract Settlement to implement the provisions of Section 7(b) of the Act (Pet. 16). Thus, their contentions must fall unless that section and the regulations make it mandatory for a contracting agency to assume direct liability for settle-

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[2] Petitioner National Machine Works, Inc., apparently recognizing that the question which it seeks to bring before this Court for review would not even have bearing on its own termination claim against Erie Basin Metal Products, Inc. (*supra*, p. 4), has abandoned the position which it took with regard to that claim in the court below.

[3] *Merritt* v. *United States*, 267 U.S. 338; *United States* v. *Driscoll*, 96 U.S. 421; *Joseph Petrin, et al.* v. *United States*, 90 C. Cls. 670; cf. *United States* v. *Blair*, 321 U.S. 730, 737-738.

ment of a subcontractor's termination claims in cases such as this.

Section 7(b) of the Contract Settlement Act provides:

> Whenever any contracting agency is satisfied of the inability of a war contractor to meet his obligations it shall exercise supervision or control over payments to the war contractor on account of termination claims of subcontractors of such war contractor to such extent and in such manner as it deems necessary or desirable for the purpose of assuring the receipt of the benefit of such payments by subcontractors.

And, as petitioners point out (Pet. 9, 16), Sec. 3(c) of Regulation 17 of the Office of Contract Settlement, 10 F.R. 6251, *infra,* pp. 18-19 (as well as Section 662.3 of the Joint Termination Regulation of the War and Navy Departments, 10 F.R. 7986, *infra,* pp. 20-21) provides, in general terms and subject to certain restrictions, that whenever a contracting agency is satisfied that a war contractor is unable to meet his obligations and where it considers that other procedures established by the regulations would be inadequate, it shall settle the termination claims of subcontractors directly. In addition, Section 3(e) of Regulation 17, 10 F.R. 6251, *infra,* p. 20, and Section 663.5 of the Joint Termination Regulations, 10 F.R. 7986, *infra,* pp. 21-22, provide that, *where liability for direct settlement has been assumed,* such settlement shall be made

without deduction for claims which the Government may have against the prime contractor.[4]

In the first place, as the court below noted (R. 35), these regulations do not purport to eliminate the statutory requirement of Section 7(d), not here satisfied, that written notice of acceptance of responsibility must be given as a condition of the Government's liability to a subcontractor. Nor is there any suggestion in the present cases that payment on account of petitioners' claims may be made directly to the bankrupt prime contractor, so as to deprive petitioners of the assurance given by Section 7(b) that they are to receive the full benefit of payments to the prime contractor on account of their claims. But more important, petitioners' argument that it was mandatory, under Section 7(b) and the regulations, for the contracting agency to assume direct liability overlooks other portions of the statute and the regulations which are directly controlling here.

Section 18(e) of the Act, 41 U.S.C. 118 (e), *infra*, p. 18, provides that whenever any contracting agency "believes" that a settlement was induced by

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[4] These regulations were issued after the receipt of an advisory opinion of the Attorney General, 40 Op. A.G. 357, stating that, under the Contract Settlement Act, the Director of Contract Settlement and the contracting agencies were not required to make deductions from payments to subcontractors of amounts due the Government from higher-tier contractors. The opinion stressed, however, 40 Op. A.G. at 363-364, that there was no intention of suggesting that there was no authority to make such withholdings where deemed advisable.

fraud, it shall report the facts to the Department of Justice. It further provides that:

> * * * until the Department of Justice notifies the contracting agency that in its opinion the facts do not support the belief that the settlement was induced by fraud, the contracting agency, by set-off or otherwise, may withhold, from amounts owing to the war contractor by the United States under such settlement or otherwise, the amount of the settlement, or the portion thereof, which, in its opinion, was affected by the fraud.

Similar provision is made in Section 16(b), 41 U.S.C. 116(b) for situations in which the Comptroller General "is convinced" that any settlement was induced by fraud, and, not surprisingly, prevention of improper payments and detection and prosecution of fraud are listed as prime objectives of the Act. Section 1(f), 41 U.S.C. 101(f). Civil liabilities for making fraudulent claims are provided by Section 19(c)(1), 58 Stat. 667-668, 41 U.S.C. 119, including the forfeiture and refund of any benefit received as a result of fraud. And these statutory provisions have likewise been implemented by regulations. Section 138.2 of the Joint Termination Regulations, 10 F.R. 5174, *infra*, p. 22, required officers and employees to prepare and submit reports in any cases in which they had reason to believe that fraudulent claims had been presented or a settlement induced by fraud, and also required that no further action be taken by them with regard to such termination claims, by negotiation or otherwise.

It is in the face of these statutory provisions and regulations for the prevention of fraud that petitioners contend that, even though the contracting agency found reason to believe that Batavia, the prime contractor, had attempted to defraud the Government, it was mandatory for that agency to assume direct liability to subcontractors which that agency had reason to believe were part of a group of affiliated and interlocking corporations controlled by the same interests as those controlling the prime contractor. Obviously, both the statute and the regulations negative any such contention that payments must be made to a subcontractor which may be tainted with fraud.[5]

Moreover, the regulations upon which petitioners rely expressly provided that contracting agencies should not assume direct liability to a subcontractor in any case where the Government would not otherwise be required to bear the cost of settling the terminated subcontract. Section 6, Regulation 17 of the Office of Contract Settlement, 10 F.R. 6251, *infra,* p. 19; Section 664(1) of the Joint Termination Regulations, 10 F.R. 7986, *infra,* p. 21. Thus, as the court below held (R. 36), where a dispute arises between the Government and the prime contractor as to the Government's liability on the prime contract, the regulations become inapplicable by their own terms. The direction contained else-

[5] That the Government did not attempt to utilize the suspected fraud of the prime contractor as an indiscriminate means of avoiding liability for the just claims of unaffiliated contractors affirmatively appears from the fact, admitted by petitioners (Pet. 11), that the Government scheduled payments of other subcontractors out of funds which it had deposited for that purpose.

where in the regulations that the contracting agencies are not to utilize their right to set-off against subcontractors the Government's claims against the prime contractor, where liability to the prime contractor for the amount of the subcontract termination claims has been established (*supra*, pp. 8-9), does not conflict with or supersede the command that direct settlement of subcontractors' claims shall not be undertaken where the Government would not otherwise be required to bear the cost of settling the terminated subcontract.[6] Where, as here, the Government might be held not to bear the cost of settling the subcontracts, because of their asserted affiliation with an allegedly fraudulent prime, it cannot be said that any liability to the prime contractor, for the account of the subcontractor, has been established. Nor does the regulation compel the Government to assume direct liability to a subcontractor where, pursuant to the Act and the regulations, payment of the settlement has been withheld and tentative approvals of settlement withdrawn.

3. Petitioners contend that the Court of Claims

[6] The prohibition against deducting claims against the prime contractor from the amounts due a subcontractor, to whom direct liability has been assumed, does not eliminate the requirement that direct liability shall be assumed only where the Government would otherwise be required to bear the cost of settling the subcontractor's claim. Even though the amount actually payable to a prime contractor on account of a subcontractor's claim might be reduced by set-off of other claims, the Government would nevertheless be required to bear the cost of settling the terminated subcontract through the reduction or elimination of the amount which it might otherwise have collected on those other claims.

erred in finding on the record before it that a dispute had arisen between the Government and the prime contractor as to the Government's liability on the contract (Pet. 10-11). However, as mentioned above, pp. 4-5, prior to acting on the Government's motion for summary judgment, the court below had considered petitioners' motions to strike the special answers of the Government; and the allegations of the special answers, which constituted a part of the record before the Court of Claims, and are now part of the certified record in this Court, clearly show that such a dispute exists. Moreover, even the Government's answers, as distinguished from its special answers, denied that "* * * there is any amount due and owing to the plaintiff * * * *under any cause of action arising out of the prime contract* or subcontract * * *" (emphasis supplied) (R. 9, 19). It is difficult to conceive of better proof that a dispute exists than formal allegations of its existence filed by one of the parties to the dispute.[7] Nor would it serve any good purpose for this Court to require submis-

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[7] Contrary to petitioners' suggestion (Pet. 11), the fact that the Government scheduled the claims of other subcontractors for payment is not enough to show that no dispute exists between Batavia and the Government. The Government must be free to deal with the individual claims of subcontractors where there is no basis for believing that those subcontractors were affiliated with a prime contractor who attempted to defraud the Government. And in addition to other procedures for direct settlement of subcontractors' claims, Section 7(f) of the Act, 41 U.S.C. 107(f), authorizes contracting agencies to make payments of fair compensation to subcontractors who otherwise could not receive such compensation where in the circumstances of those cases equity and good conscience require such payments.

sion in the court below of further evidence of a dispute which the Government fully documented by its special answers, stricken on petitioners' motion (*supra,* pp. 4-6).

4. There is no conflict. The decision in *Daniel Hamm Drayage Co.* v. *Willson,* 178 F. 2d 633 (C.A. 8), with which petitioners claim the decision below is in conflict (Pet. 14, 11), is clearly distinguishable; in that case the Government had assumed direct liability to the subcontractors. 178 F. 2d at 637, 638. Indeed, in that case the Government sought to make direct payments to the subcontractors, and the controversy existed between the Government and the trustee of the bankrupt prime contractor. Nor is the decision below in conflict with the dictum in *United States* v. *Griffin,* 303 U.S. 226, 238-239, (see *United States* v. *Jones,* 336 U.S. 641, 666, *et seq.*) to the effect that a railroad which has fulfilled its compulsory duty of carrying the mails might recover in the Court of Claims if the Interstate Commerce Commission failed, through an error of law, to award the compensation required under the statutes governing mail pay. Here, as shown above, the contracting agency did not breach any requirement of statute or regulation. Likewise, reliance upon cases such as *United States* v. *Wickersham,* 201 U.S. 390, and *Daniel Simon* v. *United States,* 113 C. Cls. 182, which were suits by government employees discharged in violation of the civil service statutes and regulations, is based on the erroneous assumption that the regulations issued under the Contract Settlement Act made it

mandatory in cases such as these for the contracting agency to assume direct liability to petitioners. And, as the court below pointed out (R. 37), there is no conflict with the decision of the Appeal Board of the Office of Contract Settlement in *Ohio Casket Hardware Co., Inc., d/b/a Allen Tool & Mfg. Co.* v. *War Department,* 1 App. Bd. O.C.S. No. 21. As the opinion of the Board in that case states, at p. 6, the prime contract involved contained express provisions making the Government responsible for settling the claims of subcontractors even though the contract was terminated for default. The fact that the amount actually payable to the prime contractor might have been subject to a set-off or counterclaim in no way conflicted with the requirement of the regulations, not here satisfied, that the Government otherwise be responsible for bearing the cost of settling the terminated subcontract (*supra,* p. 11). No other conflict is alleged by petitioners, and the decision below is in accord with the previous decisions of the Court of Claims in *Kal Machine Works, Inc.* v. *United States,* 68 F. Supp. 436; and *Precision Metal Machine Co.* v. *United States,* 68 F. Supp. 437. Even if it be assumed that a conflict does exist, for the reasons stated above, pp. 6-7, such a conflict would no longer call for consideration and resolution by this Court.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1953.

APPENDIX

Section 7(b) of the Contract Settlement Act, 41 U.S.C. 107(b), provides:

> (b) Whenever any contracting agency is satisfied of the inability of a war contractor to meet his obligations it shall exercise supervision or control over payments to the war contractor on account of termination claims of subcontractors of such war contractor to such extent and in such manner as it deems necessary or desirable for the purpose of assuring the receipt of the benefit of such payments by the subcontractors.

Section 7(d) of the Contract Settlement Act, 41 U.S.C. 107(d), provides:

> (d) Any contracting agency may settle directly termination claims of subcontractors to the extent that it deems such action necessary or desirable for the expeditious and equitable settlement of such claims. In making such termination settlements any contracting agency may discharge the claim of the subcontractor by payment or may purchase such claim, and may agree to assume, or indemnify the subcontractor against, any claims by any person in connection with such claim or the termination settlement. Any contracting agency undertaking to settle the termination claim of any subcontractor shall deliver to the subcontractor and the war contractor liable to him written notice stating its acceptance of responsibility for settling his claim and the conditions applicable thereto, which may include the release, or as-

signment to the contracting agency, of his claim against the war contractor liable to him; upon consent thereto by the subcontractor, the Government shall become liable for the settlement of his claims upon the conditions specified in the notice.

Section 18(e) of the Contract Settlement Act, 41 U.S.C. 118(e), provides:

> (e) Whenever any contracting agency or the Administrator of General Services believes that any settlement was induced by fraud, the agency or Administrator of General Services shall report the facts to the Department of Justice. Thereupon, (1) the Department of Justice shall make an investigation to determine whether such settlement was induced by fraud, and (2) until the Department of Justice notifies the contracting agency that in its opinion the facts do not support the belief that the settlement was induced by fraud, the contracting agency, by set-off or otherwise, may withhold, from amounts owing to the war contractor by the United States under such settlement or otherwise, the amount of the settlement, or the portion thereof, which, in its opinion, was affected by the fraud. In any such case the Department of Justice shall take such action as it deems appropriate to recover payments made to such war contractor.

Section 3(c), Regulation 17, of the Office of Contract Settlement, 10 F.R. 6251, provides:

> (c) Whenever any contracting agency is satisfied that a war contractor is, or is in serious

danger of becoming, unable to meet his obligations, and where it considers that action under paragraph 2 of this regulation would fail to assure prompt payment of the termination claims of his subcontractors, the contracting agency shall, subject to paragraph 6 hereof, settle directly the termination claims of such subcontractors.

Section 6, Regulation 17, of the Office of Contract Settlement, 10 F.R. 6251, provides:

6. *Payments only if liability otherwise exists.* —Except to the extent required in order to give effect to the provisions of paragraph 3(e) or 5 [8] of this regulation, a contracting agency shall not under this regulation assume any liability or undertake to make any payment on account of the termination claim of a subcontractor in any case where the Government would not otherwise be required to bear the cost of settling the terminated subcontract. When payment has been made to a prime contractor or a higher tier war contractor on account of any portion of the termination claim of a subcontractor, an additional payment on account of the same portion of that claim may be made only in accordance with paragraph 5 of this regulation or to the extent that the prior payment has been recovered by the Government.

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[8] Paragraph 5 refers to supplemental payments made by the contracting agencies under Section 7(f) of the Act where the circumstances of the case require, in equity and good conscience, that a subcontractor receive fair compensation even though such compensation may already have been included in payments to the prime contractor.

Section 3(e), Regulation 17, Office of Contract Settlement, 10 F.R. 6251, provides:

> (e) Direct settlement with a subcontractor may be made without regard to any assignment by, or insolvency or bankruptcy of, higher tier war contractors, and without regard to set-offs between contractors in the contractual chain. Such direct settlement shall be made without deduction for claims which the Government may have against the prime contractor or any other higher tier war contractor. Nothing herein shall prevent a contracting agency from protecting set-offs which the Government may have against the subcontractor with whom direct settlement is made.

Paragraph 662.3, Joint Termination Regulations, 10 F.R. 7986, provides:

> 662.3 *When required.* — Whenever the contracting officer is satisfied that a war contractor is, or is in serious danger of becoming, unable to meet his obligations, and where he considers that action under subparagraph (1) or (2) of paragraph 651.3 would fail to assure prompt payment of the termination claims of subcontractors of that war contractor, the contracting officer shall settle directly, subject to the provisions of paragraph 662.5, the termination claims of such subcontractors. The duties of the contracting officer with respect to investigation of the financial condition of a war contractor, and the determination that a war contractor is, or is in serious danger of becoming, unable to meet his obligations shall

be determined in accordance with paragraph 651.2.

Paragraph 664(1), Joint Termination Regulations, 10 F.R. 7986, provides:

> 664 *Payments only if liability otherwise exists.*—(1) Except for payments under paragraph 652,[9] and except to the extent required in order to give effect to the provisions of paragraph 663.5, payments shall be made to subcontractors under Part 5 and this Part 6 of Section VI only in cases where the Government would otherwise be required to bear the cost of settling the terminated subcontract.

Paragraph 663.5(1) and (2), Joint Termination Regulations, 10 F.R. 7986, provides:

> 663.5 *Set-offs, assignments and insolvency.*—(1) The contracting officer may settle directly with a subcontractor under paragraph 662 without regard to any assignment by, or insolvency or bankruptcy of, higher tier war contractors, and without regard to set-offs between contractors in the contractual chain. Such direct settlement shall be made without deduction for claims which the Government may have against the prime contractor or any other higher tier war contractor.
>
> (2) Set-offs which the Government may have against the subcontractor with whom direct settlement is made shall be protected to the same extent that set-offs against prime

[9] Paragraph 652 refers to the supplemental payments mentioned in footnote 8, *supra*.

contractors are protected in making payments on account of their termination claims.

Paragraph 138.2(1) and (2), Joint Termination Regulations, 10 F.R. 5174, provides:

138.2 *Duty to report fraud.*—(1) Where, at any time prior to settlement, any contracting officer or any other officer or employee of the War or Navy Department has reason to believe that there has been a violation of section 19(c) or (d) of the Act in respect of the termination claim of any war contractor, he shall take no further action thereon, either by negotiation or otherwise, but shall immediately prepare a report of all known pertinent facts without additional investigation. Unless intent to defraud clearly appears, it should not be concluded that there has been a violation of the Act with respect to claims concerning which there may be a reasonable difference of opinion.

(2) Where any contracting officer or any other officer or employee of the War or Navy Department has reason to believe that any settlement of a termination claim was induced by fraud, he likewise shall immediately prepare a report of the pertinent facts.

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FILE
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HAROLD B. WILLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 99.

NATIONAL MACHINE WORKS, INC., and INTERSTATE MACHINERY CO., INC., *Petitioners,*

v.

THE UNITED STATES, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Claims

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REPLY BRIEF FOR THE PETITIONERS

DONALD O. LINCOLN,
Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR THE PETITIONERS

Respondent devotes a major portion of its brief to argument based on allegations of fact which were not before the court below when it considered the respondent's motion for summary judgment. Because the Court may be misled by respondent's discussion of those matters as if they were relevant to this petition, we believe their correction is sufficiently urgent to warrant this reply brief. We shall not reargue or restate matters covered in our main brief.

Under Point 2 of its argument (Br., pp. 7-12), the Government attempts to justify the decision below by saying that there is no responsibility on the Government to settle directly the termination claims of petitioners as subcontractors of Batavia because Batavia was suspected of having attempted to defraud the Government and petitioners allegedly were affiliated with Batavia. In view of § 18(e) of the Contract Settlement Act, those asserted suspicions, says the Government, prevent petitioners from enforcing their right to direct settlement. This argument of the Government is improper and should not be considered for two reasons.

First, the Court of Claims in its decision of October 7, 1952 (123 C. Cls. 433, 107 F. Supp. 588; certified record pp. 123-126), held this same legal theory of the Government insufficient to deprive the Court of Claims of jurisdiction over petitioners' causes of action. That decision, entered on petitioners' motion to strike the special answers of the Government setting up the allegations referred to above, was not appealed from by the Government and stands as the law of the case.

Second, prior to its consideration of the Government's motion for summary judgment, the court below struck the special answers containing the allegations now relied on by the Government; consequently, they were not before the court below when it considered the Government's motion for summary judgment.

Even if the special answers, though previously stricken by the court, were considered by the court in the course of its deliberations on the Government's motion for summary judgment, it is obvious that the court would not have based its decision on the theory that the Government's assertions of possible fraud by Batavia and alleged affiliation of petitioners with Batavia deprived the petitioners of the right to enforce direct payment of their termination claims. Having unequivocally rejected that theory in its decision on the motion to strike entered on October 7, 1952, from

which no appeal was taken, the court would scarcely have based its decision on the motion for summary judgment on that rejected theory.

The Government next argues under Point 2 (Br., pp. 11, 12) that petitioners are deprived of the right to enforce direct payment of their termination claims because under § 6, Regulation 17, Office of Contract Settlement, and §664(1) of the Joint Termination Regulations the Government *might* not be required to settle the petitioners' subcontracts directly "because of their asserted affiliation with an allegedly fraudulent prime." The argument falls of its own weight because a conjecture is without legal efficacy in relation to a motion for summary judgment. *Garcia* v. *United States*, 123 C. Cls. 722, 108 F. Supp. 608 (1952).

Further, those Regulations provide that except as provided elsewhere in the Regulations, the contracting agency shall not make payments to subcontractors where the Government would not otherwise be required to settle the terminated subcontract. Under § 7(b) of the Contract Settlement Act and Regulation 17, as well as under § 7(d) of the Act and Regulation 17 compelling the exercise of discretion by contracting agencies, the latter were *required* to settle subcontractors' claims where the prime contractor was insolvent. The exception incorporated in § 6 of Regulation 17 and § 664(1) of the Joint Termination Regulation is precisely to the effect that direct settlement may be made without regard to insolvency of the prime contractor and that direct settlement shall be made without regard to claims which the Government may have against the prime contractor. In short, the Regulations relied upon by the Government at page 11 of its brief are no barrier to the obligation elsewhere conferred by the statute and regulations on the contracting agencies to settle directly the claims of subcontractors whose prime contractors become insolvent. It would be an absurd and unnecessary interpretation of those sections which would prevent the contracting agencies from carrying out the duty which the statute

and the regulations elsewhere expressly impose upon them to settle directly with subcontractors whose prime contractors have become bankrupt.

Point 3 of the Government's brief is directed to petitioners' Specification of Errors Nos. 2 and 3. In essence, those specifications are that petitioners' right to recovery cannot legally be qualified by any state of accounts between the prime and the Government, and that in any event there was no evidence before the court upon which it could properly hold that any dispute existed between the prime and the Government. The Government argues (Br. pp. 13, 14) that the allegations of the special answers show that such a dispute exists.

The Government's reliance here on the allegations of the special answers as the basis for the court's decision below pointedly illustrates the paucity of support for their position. The special answers were not before the court in ruling on the motion for summary judgment. They are not a proper part of the record before this Court. They were not specified in petitioners' designation of the contents of record below. They were included in the record certified by the Clerk of the Court of Claims to this Court at his request, and with the consent of petitioners' counsel, as a matter of administrative convenience because of certain physical difficulties encountered in separating the special answers from the other pleadings. The Clerk of the Court of Claims has indicated a willingness to certify this fact if the Court should desire it.

The special answers, of course, were not printed in the printed record in this case. The Stipulation Re Printing of Record (R. 46, 47) contains the usual agreement that the parties may refer to portions of the certified record not included in the printed record. This stipulation properly permits the Government to refer to those portions of the affidavits, exhibits thereto, and certified court papers filed by petitioners in the court below in opposition to the Government's motion for summary judgment which are not

printed in the record. The stipulation does not and could not bring before this Court as a suitable basis for its decision matters which were not before the court below and which could not properly have been considered by it in rendering its decision.

Even if the special answers had been before the court below and considered by it, the allegations of the special answers provide no adequate basis for a finding by the court of a dispute between the prime and the Government. Since the special answers were stricken by the court below, no reply by petitioners to their allegations was required. Since they did not contain a counterclaim or plea of fraud as such, the special answers did not require a reply (Rule 16, Rules of the Court of Claims), and all of their averments, had they not been stricken, would have been taken as denied or avoided (Rule 15(c), Rules of the Court of Claims).

The rule of the Court of Claims pertaining to summary judgment (Rule 51) is patterned after Rule 56 of the Federal Rules of Civil Procedure. *Garcia* v. *United States,* 123 C. Cls. 722, 108 F. Supp. 608, 613 (1952). The only extra-pleading matters which may be considered on a motion for summary judgment are depositions, admissions, or affidavits. *Sardo* v. *McGrath,* 196 F. 2d 20 (D.C. Cir., 1952). The special answers were not a part of the pleadings since they had been stricken by the court below prior to consideration by the court of the motion for summary judgment. Further, the Government offered no affidavits, depositions, or admissions in support of its motion. All that remained were the pleadings themselves.

The motion, therefore, was no more than a motion for judgment on the pleadings. For the purpose of the motion, all of the well-pleaded allegations of the petitioners' complaints must be taken as true and all of the allegations of the moving party—the Government—which have been denied must be taken as false. 2 Moore's Federal Practice (2d Ed.) ¶ 12.15, p. 2269. Since the special answer in each

case was a pleading to which no reply was required, its allegations are deemed to be denied (Rule 15(c), Rules of the Court of Claims). Therefore, the allegations of Batavia's suspected fraud and the asserted affiliation of petitioners with Batavia upon which the Government now bases its argument here should have been considered as false by the court below in ruling on the motion for summary judgment. Similarly, the allegation contained in the Government's answer itself denying that any amount was due the petitioners under any cause of action arising out of the prime contract or subcontract, which the Government says at page 13 of its brief would be a sufficient basis upon which the court below could have found that a dispute existed, should likewise have been regarded by the court as false in ruling on the motion. 2 Moore's Federal Practice (2d Ed.) ¶ 12.15, p. 2270. Even if the Government's answer itself were accorded the dignity of an affidavit, it does no more than take issue with the factual allegations of the complaint and could not provide the basis for summary judgment. *Rogers* v. *Girard Trust Co.*, 159 F. 2d 239, 242 (C.C.A. 6th, 1947).

Considered as a document other than a pleading before the court on the motion, the special answer in each case is similarly deficient as a basis for a finding of a dispute between Batavia and the Government. The special answer was not verified and consequently may not be regarded either as an affidavit or a deposition. Originating with the Government, it obviously did not constitute an admission by petitioners. Its allegations, therefore, could not be weighed by the court in ruling on the motion for summary judgment. See *Wittlin* v. *Giacalone*, 154 F. 2d 20, 22 (C.A. D.C., 1946). The fact that the allegations of the special answer were taken as true for the purpose of testing its legal sufficiency when the court was considering petitioners' motion to strike, does not carry over into the court's separate consideration of the Government's motion for summary judgment after petitioners' motion to strike was

granted. See *Regnaud* v. *White,* 170 F. 2d 323, 327 (C.C.A. 6th, 1948).

The court below, therefore, had no proof before it establishing one way or another any facts regarding any possible dispute between the prime contractor and the Government, if, indeed, such a fact has any relevance to petitioners' right of action. The special answer could not supply such proof because it was not before the court and, if it had been, its allegations would have had to be taken by the court as false. The answer could not serve such a purpose since it merely put the allegations of the complaint in issue—that is, it tended to show the presence of a genuine issue rather than the absence of one.

Summary judgment is proper only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial. *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620, 627 (1944). The record below scarcely makes it clear what the situation is regarding a dispute between Batavia and the Government. So far as it speaks, the record puts the fact of such a dispute into issue. On a motion for summary judgment it is no part of the court's function to decide issues of fact, but solely to determine if there are any such issues of fact to be tried. *Butcher* v. *United Electric Coal Co.,* 174 F. 2d 1003, 1006 (7th Cir., 1949); 3 Moore's Federal Practice (1938 Ed.) § 56.04.

If, indeed, the court below regarded the presence of a dispute between the prime and the Government as material to petitioners' right of action, it could not properly have found that such a dispute existed and, indeed, it was not its function to decide such a fact.

The Government says (1) that it can conceive of no "better proof that a dispute exists than formal allegations of its existence filed by one of the parties to the dispute," (Br., p. 13) and (2) that it "fully documented" the existence of a dispute "by its special answers." (Br., p. 14). Enough has been said in this reply brief to show the sheer absurdity of those statements.

Justice is not served by the respondent's proffer here of argument based on scandalous allegations which had been stricken by the court below before it took up the motion for summary judgment, any more than it is by that court's denial of petitioners' right to a trial on the merits by a summary decision bottomed on unfounded illusions of fact and errors of law. All of respondent's brief except Points 1 and 4 are infected with this improper use of the fraud allegations contained in the stricken special answers, and therefore should be disregarded. Points 1 and 4 are adequately covered in our main brief.

Respectfully submitted,

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